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No. 624

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

CREAMER INDUSTRIES, INC., *Petitioner*

v.

UNITED STATES OF AMERICA AND
ELLIS CAMPBELL, JR., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on July 2, 1965.

CITATIONS TO OPINIONS BELOW

The opinion and judgment of the United States District Court for the Northern District of Texas, Fort Worth Division, (R. 151 to 160) is not officially reported. The opinion and judgment of the Court of Appeals entered July 2, 1964 (R. 186-194) also has not been officially reported. It is printed in Appendix B hereto, *infra, pages* 21 to 35. The judgment of the Court issued as mandate, is printed in Appendix B hereto at page 36, *infra.*

JURISDICTION

The Judgment of the Court of Appeals was entered July 2, 1965. A rehearing was not applied for. Mandate was issued July 26, 1965. The jurisdiction of this Court is invoked under Title 28 USC Section 1254 and Title 26 USCA, Section 7482 (Internal Revenue Code of 1954, Section 7482).

QUESTIONS PRESENTED

Three basic questions are presented for decision by this Court in this proceeding. They are:

1. Whether the lien of the United States for taxes assessed against Maxwell Steel Company, Inc. (hereinafter sometimes referred to as Maxwell) ever attached to the real estate (some six lots located in the City of Fort Worth, Tarrant County, Texas) involved in this proceeding.

This, in turn, involves a determination whether the aforesaid six lots *belonged to Maxwell or whether Maxwell had any rights in and to such lots*, when assessments of deficiency taxes and additions thereto were made against Maxwell. *Ownership* of or possession of rights in and to such lots by Maxwell *when the assessments of deficiency taxes and additions thereto against Maxwell were made* are prerequisite to the creation of any lien against such lots in favor of the United States based upon assessments of tax against Maxwell.

2. Did Creamer Industries, Inc. become a "purchaser" of the six lots involved in this proceeding, as

that term is used in Section 6323(a) Internal Revenue Code of 1954, prior to the time that deficiency assessments of Federal taxes and interest were made against Creamer's grantor (Maxwell Steel Company, Inc.) and notices of such assessments filed.

3. Is the tax system of the United States subject to the recording laws of the several states — in this case the recording laws of the State of Texas?

STATUTES AND REGULATIONS INVOLVED

The statutory provisions and Treasury Regulations involved are: Section 6321 IRC 1954; Section 6322 IRC 1954; Section 6323 IRC 1954; Treasury Regulations, Section 301.6323-1(a) and 301.6323-1(b) promulgated under and interpretative of the provisions of Section 6323 of the Internal Revenue Code; 19 Vernon's Ann. Tex. Civ. St. Art. 6627. They are printed in Appendix A of this Petition at pages 19 to 26, *infra*.

STATEMENT

1. On January 21, 1959, Maxwell Steel Company, acting through its directors in formal meeting "resolved that Maxwell Steel Company forthwith sell, transfer, assign and deliver to Creamer Industries, Inc., all of the assets of Maxwell Steel Company, including, but not limited to, all real and personal property, choses in action, contracts in progress and accounts receivable, for the consideration expressed in the proposed contract of sale exhibited to this meeting * * *." (R. 64-65)

2. On the same date Creamer Industries, Inc., through its incorporators and corporate officers, "resolved that Creamer Industries, Inc. purchase from Maxwell Steel Company, a Texas Corporation, all of its property, rights, privileges and franchises to be paid in such manner and on such terms as set out in the proposed contract of sale exhibited to the meeting." (R. 71)

3. On January 21, 1959, fixed by the parties as the closing date, Creamer Industries, Inc. paid to Maxwell Steel Company the sum of $183,000.00 in cash and assumed specified indebtedness amounting to more than $1,100,000.00 as consideration for the properties (all property, real and personal, then owned by seller) covered by the contract of purchase and sale, which contract included provisions that, at the closing, the seller should deliver to the buyer such full warranty deeds, bills of sales and assignments and other good and sufficient instruments, transfers and conveyances, as in the opinion of buyer's counsel should be effective to vest in the buyer good and marketable title to the assets and business sold under the agreement and that, at buyer's request, whether at or after the closing, and without further consideration, seller at its expense would execute and deliver such further instruments of conveyance and transfer as the buyer reasonably might require to evidence of record its ownership of the assets being purchased. (R. 76-81)

4. Subsequent to January 21, 1959 the contracting parties discovered that the six lots here involved inadvertently were not included in the original con-

veyances from Maxwell Steel Company, Inc. to Creamer Industries, Inc., so a deed containing the recitation "dated and effective at Fort Worth, Texas, the 21st day of January, 1959" was prepared conveying to Creamer Industries, Inc. record title to the six lots inadvertently overlooked in the original deed. This conveyance was not acknowledged until April 1, 1959 nor filed for record until April 28, 1959. (R. 61, Paragraph 15) By assignment "executed and effective as and from the 21st day of January, 1959, but acknowledged March 16, 1959", Maxwell, reciting that by contract of sale bearing even date therewith (i.e., January 21, 1959) it had contracted to sell, transfer and assign all of its assets to Creamer Industries, Inc. and to execute and deliver all assignments and other instruments necessary to vest marketable title to such assets and business in the purchaser, for a recited consideration of $1.00 assigned to Creamer Industries, Inc. all of its right, title and interest as lessor under an existing lease by it to J. W. Edwards of two of the six lots involved in this proceeding, namely, Lots 11 and 12, Block 50, Riverside Addition to the City of Fort Worth (R. 121-130). Creamer Industries, Inc. had theretofore notified J. W. Edwards, lessee that it was the owner of the leased premises (R. 126) and had collected the lease rentals from and after February, 1959 (see ledger account opposite pages 130 of the Record). (R. 127-130)

5. On March 24, 1959 assessments of income and excise taxes under Section 6861 Internal Revenue Code of 1954 were made against Maxwell Steel Com-

pany. Notice of the assessments and demand for payment were given on the same date. On March 26, 1959 notice of the tax lien incident to said assessments was filed in the office of the County Clerk of Tarrant County, Texas, where the property is located (R. 152 to 155 inclusive).

Based on the foregoing, the Honorable Joseph B. Dooley, United States District Judge for the Northern District of Texas, sitting without a jury, concluded as a matter of law:

> "1. It is manifest as a matter of law that the buyer corporation had become 'purchaser' in the most literal sense of Section 6323(a) as to the great mass of property and assets constituting the subject matter of the contract between the two corporations, and stood in that position thereto at the time the tax lien was filed.
>
> "2. The two corporations had a single contract of sale and although the subject matter included a multiplicity of items, there was simply a common and blanket consideration for the whole property, and consequently it would be too rigid in the light of the 'realities' referred to in the regulation to split the concept of 'purchaser' and say that the buyer corporation, at the time the tax lien was filed, had become a 'purchaser' in very large part, but had not become a 'purchaser' as to the very minor part of the subject matter in the contract of sale." (R. 156-157)

In its opinion and decision below (R. 186-194) entered July 2, 1965, the Court of Appeals stating that, "as between Maxwell, the seller and Creamer, the purchaser, Maxwell's interest may differ with respect

to a creditor without notice, such as the United States" concluded that under the Texas Recording Statute the sale by Maxwell to Creamer was void; assumed that because of this the United States acquired a lien against the six lots involved in this proceeding; held that under the Texas Recording Statute such purported lien was prior to the claim of Appellant in and to such real estate, and reversed the judgment of the District Court and remanded the case for entry of judgment for defendants below, who are Appellees here.

REASONS FOR GRANTING THE WRIT

1. The opinion and decision of the Court of Appeals below is contrary to settled principles repeatedly reaffirmed by this Court to the effect that the tax system of the United States is not subject to the recording laws of any state;[1]

2. The opinion and decision of the Court of Appeals for the Fifth Circuit below is in direct conflict with that of the United States Court of Appeals for the Eighth Circuit in *J. C. Gauvey d/b/a Gauvey Rig & Trucking Company v. United States* (1961) 291 F. 2d 42, which held (page 47) that "the factor of recording is not mentioned in Section 6323 and, in our opinion, this element should not be read into the statute as a condition precedent to the protection afforded the enumerated classes."[6]

3. The opinion and decision below is directly con-

[1]The first of such cases was *United States v. Snyder, et al.*, 1893, 149 US 210, 13 S. Ct. 846.

trary to express provisions of Section 6323 IRC 1954 and regulations promulgated thereunder, providing that "the lien of Section 6321 shall not be valid against any *purchaser*, and (the regulations) defining that term.[2]

4. The question of statutory interpretation here involved is important to the administration of the Federal Tax laws[3] because (i) it deals with the right of the United States, on the one hand, to collect from one citizen taxes it has assessed against another citizen who, when the assessment was made or when collection was attempted, was not the owner of the property out of which collection is sought to be made and, on the other hand, with the scope and extent of the protection afforded by the statute (Section 6323 IRC 1954) against unwarranted attempts by the taxing authorities to seize and sell the property of one citizen is satisfaction of taxes owing by another.

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[2]This provision obviously had its origin in the decision of this Court in *Thelusson et al. v. Smith*, 2 Wheaton 396; 4 S. Ct., 50, 4 L. Ed 271 (Feb. term 1817).

[3]The uncertainty that existed with regard to the necessity for recording of title papers, mortgages and like documents in order to invoke the protection afforded purchasers and three other categories by Section 6323(a) IRC 1954 was generally thought to have been set at rest by *Gauvey v. United States, supra*, and the decision of the Solicitor General not to seek certiorari in that case (cf. 1961 Prentice-Hall Tax Service ¶56462).

ARGUMENT

The threshold question in this case, as in all cases where the Federal Government asserts its tax lien, has been stated by this Court to be whether and to what extent the *taxpayer* had "property" or "rights to property" to which the tax lien could attach, *Robert Aquilino, et al. vs. United States of America, et al.*, 363 US 509, 80 S. Ct. 1277 (1960). In that case this Court (363 US 512, 80 S. Ct. 1280) said:

> "In answering that question (i.e., to what extent the taxpayer had property or rights to property to which the tax lien could attach[1]) both Federal and State Courts must look to the State Law, for it has long been the rule that 'in the application of a Federal Revenue Act, State law controls in determining ~~that~~ the ~~matter~~ nature of the legal interest which the taxpayer had in the property sought to be reached by the statute.' *Morgan vs. Commissioner*, 309 US 78, 82 60 S. Ct. 424, 426, 84 L. Ed. 585. Thus, as we held only two terms ago, Section 3670 'creates no property rights but merely attaches consequences, Federally defined, to rights created under State law * * *' *United States v. Bess* 357 US 51, 55, 78 S. Ct. 1054, 1057, 2 L. Ed. 2d 1135. However, once the tax lien has attached to the taxpayer's state created interests, we enter the province of Federal law, which we have consistently held determines the priority of competing liens asserted against the taxpayer's "property" or "rights to property" (citing authorities). * * * The application of state law in ascertaining the taxpayer's property rights and of Federal law in reconciling the claims of competing lienors is

[1]Matter in parenthesis supplied.

based both upon logic and sound legal principles. This approach strikes a proper balance between the legitimate and traditional interest which the state has in creating and defining the property interest of its citizens and the necessity for a uniform administration of the Federal Revenue Statutes."

Section 6321 IRC 1954 creating the Government's lien for its taxes, reads as follows:

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, *belonging to such person.*" (emphasis supplied)

The Court below in its opinion never reached, in fact it barely touched on, the real crux of the issues here before this Court. Such issues are:

(i) Whether, at the time the taxes upon which the government bases its purported lien were assessed against Maxwell, the lots here in controversy were, under the laws of Texas, "property belonging to such person (ie, Maxwell, the taxpayer against which the taxes were assessed) or whether Maxwell had theretofore disposed of its entire beneficial interest therein, and

(ii) Whether Creamer Industries, Inc. (hereinafter sometimes referred to as Creamer) became a "purchaser" of the properties in controversy prior to the

time any notice of the assessment of taxes against Maxwell was filed in the manner provided by Federal law.

We will first deal with Maxwell's ownership, if any, of the properties here involved when taxes were assessed against Maxwell.

I.

It is undisputed that on January 21, 1959: (i) Maxwell Steel Company, Inc. entered into a binding contract to sell, assign and transfer all of its assets of every kind and character to Creamer Industries, Inc; (ii) received from Creamer, the purchaser, the entire agreed consideration therefor; (iii) conveyed, assigned and transferred to purchaser all but a mere fraction of the property, the subject of the agreement of purchase and sale and; (iv) in accordance with its obligation under its contract with Creamer was engaged in searching out small parcels of real estate, including those here involved, which through inadvertence had been omitted from the original conveyance, and preparing the documents necessary to evidence Creamer's ownership of those parcels. The required conveyances "executed and effective this 21st day of January, 1959" were acknowledged and delivered to Creamer about April 1, 1959 (R. 132-134).

On January 27, 1959 Creamer notified one J. W. Edwards, lessee from Maxwell of lots 11 and 12 Block 50, Riverside Addition to the City of Fort Worth, Tarrant County, Texas (two of the lots involved in this proceeding) that effective as of the close of busi-

ness January 21, 1959 Creamer had acquired the operations of Maxwell and requested that future rental payments under the lease be made to Creamer (R. 126-127). Thereafter such payments were so made (reproduction of ledger sheet opposite R. 130). An assignment of the lease to Creamer "executed and effective the 21st day of January, 1959" was acknowledged the 16th day of March, 1959 and delivered to Creamer on that date. (127-130)

At the time the taxes against Maxwell were assessed, which the government contends gave rise to a lien in favor of the Government against the real estate involved in this proceeding, it is clear that Maxwell had no "ownership", of, in or to such real estate, but possessed the naked legal title to such property which it was obligated to and did place in Creamer without the payment to it of any consideration over and above that which had been paid to it on January 21, 1959.

Article 6627 Vernon's Ann. Tex Civ. St. speaks of an unrecorded conveyance of property as being "void". In the next breath, however, it says:

> "that the same as between the parties and their heirs, and as to all subsequent purchasers with notice thereof or without valuable consideration, shall be valid and binding."

The foregoing language is clear and unambiguous and expressly declares that an unrecorded deed passes the title as between the parties to the instrument, and has been so construed by the Courts of Texas, includ-

ing the Supreme Court of that State. *Urban vs. Bagby, et al.*, CCA, Galveston, 286 S.W. 519, page 525 and *Simonds, et al. v. Stanolind Oil and Gas Company*, Supreme Court of Texas, 114 S.W. 2d 226, page 335, which states the rule to be that "delay in recording a deed or failure to assert ownership promptly will not divest one of title".

It does not require much analysis to lead to the conclusion that the Texas Recordation Statutes neither give, withhold nor take away title and that its sole function is that of a priority statute. As such, it has no controlling force or effect here, as the priority of competing claims asserted against a taxpayer's "property" or "rights to property" is within the sole province of Federal law. *Robert Aquilino, et al. v. United States of America, et al.*, 363 U.S. 509, 80 S. Ct. 1277 (1960).

The decision of the Court of Appeals below was wrong for at least two reasons. In the first place, it erroneously assumed that the United States had acquired a lien against property formerly owned by Maxwell, but with respect to which Maxwell, for full and adequate consideration, had divested itself of all beneficial ownership prior to the assessment of March 24, 1959. In the second place, the Court of Appeals erroneously concluded that the competing claims of the United States and of Creamer here involved were to be resolved by application of the Texas Recording Statute, rather than under the provisions of the applicable Federal statutes and regulations, viz, Sec-

tion 6323 IRC 1954 and regulations promulgated thereunder.

For the foregoing reasons and those ably and forcefully enunciated by Brown, Circuit Judge, in dissenting from the majority opinion below (R. 192-194), we ask this Court to hold that when deficiency taxes were assessed against Maxwell, the former owner of the real estate involved in these proceedings, Maxwell had no interest in said lots, or any of them, to which any lien of the United States based on taxes assessed against Maxwell could attach as such property then belonged to another and different taxpayer, namely, Creamer.

II.

In the alternative, we say that prior to the time any lien in favor of the United States against the lots involved in this proceeding could possibly have arisen because of assessments of tax made against Maxwell Steel Company, Appellee herein, Creamer Industries, Inc., under the express terms of Section 6323 IRC 1954 as implemented by Treasury Regulations Section 301 6321-1(2)(a), had become the "purchaser" of such lots together with all of the other assets of Maxwell Steel Company, Inc. and under the plain provisions of Section 6323 IRC 1954 no lien of the United States based on assessments of tax made against Maxwell was valid against Creamer as such "purchaser."

Section 6323 IRC 1954 creates four distinct exceptions to the general sweep of Section 6321, *supra*.

It provides:

> "Except as otherwise provided in subsection (c), the lien imposed by Section 6321 shall not be valid as against any mortgagee, pledgee, *purchaser*, or judgment creditor until notice thereof has been filed by the Secretary or his delegate— (emphasis supplied)
>
> * * * * * * * * *
>
> "(1) *Under State or territorial laws.* In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; * *"

Additional exclusions from the sweep of Section 6321 IRC 1954 not here material were subsequently enacted and are to be found in the Internal Revenue Code of 1954, as amended. As far as here material, Section 301.6323-1 of Treasury Regulations construing the terminology employed in the statute read as follows:

> "Section 301.6323-1 Validity of lien against mortgagees, pledgees, purchaser, and judgment creditors.
>
> "(a) *Invalidity of lien without notice* —
>
> "(1) *Filing of notice.* The lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice of lien has been filed.
>
> * * * * * * * * *
>
> "(2) *Meaning of terms.* (i) As used in section

6323 and this section:

"(a) The term 'purchaser' means a person who, for a valuable present consideration, acquires property or an interest in property.

* * * * * * * * *

"(b)(ii) The determination whether a person is a mortgagee, pledgee, purchaser, or judgment creditor, entitled to the protection of section 6323(a), shall be made by reference to the realities and the facts in a given case rather than to the technical form or terminology used to designate such person. * * * * * *"

It is undisputed that in the case at Bar that on January 21, 1959 Creamer Industries, Inc. "for a valuable present consideration", ie, through the payment of $183,000.00 in cash and the assumption of liabilities aggregating in excess of $1,000,000.00 had acquired "property or an interest in property" consisting of all of the assets of Maxwell Steel Company, Inc., ie, Creamer Industries, Inc. had received and recorded deeds, bills of sale and other instruments conveying to it of record all but a negligible fraction of the assets it had contracted to purchase and had paid for, and had acquired the right, without further consideration, to demand and receive recordable evidence of its ownership of any other property belonging to Maxwell Steel Company, Inc. on January 21, 1959 not covered in the initial deeds, bills of sale and other forms of conveyance. Later, and before the Government's notice of tax lien was filed there had been assigned to Creamer Industries, Inc. by Maxwell Steel Company, Inc. by instrument "effective as and

from the 21st day of January, 1959" and acknowledged the 16th day of March, 1959, all of the rights, titles and interests of Maxwell Steel Company, Inc. as lessor, in and to Lots 11 and 12, Block 50, Riverside Addition to the City of Fort Worth, Tarrant County, Texas (two of the six lots involved in this proceeding), together with the improvements thereon (R. 126-130) and from and after February 1, 1959 Creamer had collected the rentals due under the aforesaid lease agreement from J. W. Edwards, lessee (cf: reproduction of ledger sheet opposite R. 130).

Clearly, as found by the District Court, within the purview of Section 6323 IRC 1954 Creamer had become the "purchaser" of the entire assets of Maxwell Steel Company, Inc., including the real estate involved in this proceeding, prior to the assessment of taxes against Maxwell and the filing of notice of such assessment (R. 156-157). It follows that no lien valid as against Creamer ever arose in favor of the United States against the real estate involved in this proceeding because of the assessments of taxes against Maxwell.

CONCLUSION

The opinion and decision below was at variance with settled principles repeatedly announced by this Court to the effect that property rights are to be determined under state law, but that determinations as to the priority or lack of priority of Federal tax liens are governed solely by Federal law. The conclusion reached in the majority opinion below, based

as it was entirely upon provisions of a recording statute of the State of Texas, is contrary to express provisions of Federal statutes, and regulations thereunder, dealing with the priority or lack of priority of Federal tax liens, and is in direct conflict with the opinion and decision of the United States Court of Appeals for the Eighth Circuit (1961) in *J. C. Gauvey, d/b/a Gauvey Rig & Trucking Company v. United States of America, Supra.* These conflicts should be resolved by this Court.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

STATUTES AND REGULATIONS
IRC 1954

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 6323. VALIDITY AGAINST MORTGAGEES. PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) Invalidity of Lien Without Notice.—Except as otherwise provided in subsections (c) and (d), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) Under state or territorial laws.—In the of-

fice designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) **With clerk of district court.**—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

(3) **With clerk of district court for District of Columbia.**—In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) Form of Notice.—If the notice filed pursuant to subsection (a)(1) is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a)(2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien.

TREASURY REGULATIONS
PROCEDURE AND ADMINISTRATION

§301.6316-8 Interest, additions to tax, etc.

Any reference in §§301.6316-1 to 301.6316-7, inclusive, to "tax" shall be deemed also to refer to the interest, additions to the tax, additional amounts, and penalties attributable to the tax.

LIEN FOR TAXES

§301.6321 Statutory provisions; lien for taxes.

Sec. 6321. *Lien for taxes.* If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

§301.6321-1 Lien for taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, tangible or intangible, belonging to such person. The lien attaches to all property and rights to property belonging to such person at any time during the period of the lien, including any property or rights to property acquired by such person after the lien arises. For the special lien for estate and gift taxes, see section 6324 and §301.6324-1.

§301.6322 Statutory provisions; period of lien.

Sec. 6322. *Period of lien.* Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made

and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

§301.6323 Statutory provisions; validity against mortgagees, pledgees, purchasers, and judgment creditors.

Sec. 6323. *Validity against mortgagees, pledgees, purchasers, and judgment creditors*—(a) *Invalidity of lien without notice.* Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under State or territorial laws.* In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) *With clerk of district court.* In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

(3) *With clerk of district court for District of Columbia.* In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) *Form of notice.* If the notice filed pursuant to subsection (a) (1) is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a) (2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien.

§301.6323-1 Validity of lien against mortgagees, pledgees, purchasers, and judgment creditors.

(a) *Invalidity of lien without notice*—(1) *Filing of notice.* The lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice of lien has been filed. (See, however, section 6323 (c) and paragraph (b) of this section, relating to the circumstances under which the lien is not valid with respect to a security even though notice thereof is duly filed.) The place for the filing of the notice of lien is:

(i) The office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has designated an office within the State or Territory for the filing of such notice;

(ii) The office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

(iii) The office of the clerk of the United States

District Court for the District of Columbia if the property subject to the lien is situated in the District of Columbia.

(2) *Meaning of terms.* (i) As used in section 6323 and this section:

(a) The term "purchaser" means a person who, for a valuable present consideration, acquires property or an interest in property.

(b) The term "judgment creditor" means a person who has obtained a valid judgment in a court of record and of competent jurisdiction for the recovery of specifically designated property or for a certain sum of money and, in the case of a judgment for the recovery of a certain sum of money, who has a perfected lien under such judgment on the property involved. The term "judgment" does not include an inchoate lien, such as an attachment lien, unless and until such lien has ripened into a judgment. United States v. Security Trust and Savings Bank (1950) 340 U.S. 47. Nor does the term "judgment" include the determination of a quasi-judicial body or of an individual acting in a quasi-judicial capacity, such as, for example, the action of State taxing authorities. United States v. Gilbert Associates (1953) 345 U.S. 361; and United States v. City of New Britain (1954) 347 U.S. 81.

(ii) The determination whether a person is a mortgagee, pledgee, purchaser, or judgment creditor, entitled to the protection of section 6323 (a), shall be made by reference to the realities and the facts in a

given case rather than to the technical form or terminology used to designate such person. Thus, a person who is in fact and in law a mortgagee, pledgee, or purchaser will be entitled as such to the protection of section 6323 (a) even though such person is otherwise designated under the law of a State, such as the Uniform Commercial Code.

(3) *Form of notice.* The form to be used for filing the notice of lien shall be Form 668, "Notice of Federal Tax Lien under Internal Revenue Laws." Such notice, filed in the office designated by the law of a State or Territory, shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien. For example, the omission from the notice of lien of a description of the property subject to the lien will not affect the validity thereof, even though the law of the State or Territory requires that the notice of lien contain a description of the property subject to the lien.

19 Vernon's Annotated Texas Cixil Statutes:

> Art. 6627. *When Sales, etc., to be void unless registered*
>
> All bargains, sales and other conveyances whatever (of any land, tenements and hereditaments, whether they may be made for passing any estate of freehold of inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing; and all deeds of trust and mortgages shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they

shall be acknowledged or proved and filed with the clerk, to be recorded as required by law; but the same as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof or without valuable consideration, shall be valid and binding.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21188

UNITED STATES OF AMERICA and
ELLIS CAMPBELL, JR., Appellants,

versus

CREAMER INDUSTRIES, INC., Appellee.

Appeal from the United States District Court
for the Northern District of Texas.

(July 2, 1965.)

Before RIVES, BROWN and WISDOM, Circuit Judges.

RIVES, Circuit Judge: This action was brought by a purchaser from the taxpayer. The deed had inadvertently failed to include certain real property located in Tarrant County, Texas. A correcting deed was executed and recorded after the tax lien was filed. The question is whether the federal tax lien attaches to the property erroneously omitted from the original deed.

On January 21, 1959, Creamer Industries, Inc., the ultimate purchaser, and Maxwell Steel Company, Inc., the taxpayer, entered into a contract whereby all of Maxwell's assets were to be transferred and con-

veyed to Creamer. The consideration paid by Creamer was $183,000 and the assumption of some of Maxwell's indebtedness, amounting in total to more than $1,100,000. By inadvertence the contract failed to list or describe in any way the six lots of land, five of which are the subject of this lawsuit. The deeds executed on the same day likewise omitted these six lots.

On March 24, 1959, the United States made a jeopardy assessment against Maxwell for $430,523.09, which included past due income taxes and excise taxes. Notice of the tax lien which arose by virtue of the assessment was filed on March 26, 1959, two days after the assessment.

Thereafter, on or about April 1, 1959, Maxwell executed and delivered a correcting deed, conveying these lots to Creamer. The deed was back-dated to January 21, 1959, but was recorded on April 28, 1959.

Before discussing and deciding the merits, we must dispose of a question of jurisdiction. While Professor Moore questions with deference whether such an inflexible rule is needed or sound,[1] the present rule is that a fundamental question must be raised sua sponte by a federal appellate court first as to its own jurisdiction and then as to the jurisdiction of the court from which the appeal comes.[2] Jurisdiction of this appeal from a final decision of the district court

[1] 1 Moore, Federal Practice ¶0.60[4], p. 610.

[2] Mansfield, C. & L.M. Ry. Co. v. Swan, 1884, 111 U.S. 379, 382; McNutt v. General Motors Acc. Corp., 1936, 298 U.S. 178, 189; Birmingham Post Co. v. Brown, 5 Cir. 1954, 217 F.2d 127, 130.

is conferred on this Court by 28 U.S.C. 1291. While the action in the district court sought an injunction, we think that the district judge did not err in treating it as a suit to quiet title to real property clouded by a federal tax lien. The complaint alleged that the proceeding is brought under 28 U.S. Code 2410. The district court stated: "So far as Section 2410 is a point, I do not see any attending lack of jurisdiction in this suit. United States v. Morrison, 247 F.2d 285." The Ninth Circuit disagrees with our decision in *United States v. Morrison, supra*, relied on by the district court, but bases jurisdiction of a suit to quiet title to land attacking the validity or priority of a federal tax lien upon 28 U.S.C. 1340.[3] The Government has now abandoned its attack upon the jurisdiction of the district court. Upon one basis or another, we are satisfied that there was no lack of jurisdiction.[4]

The district court based its ruling with the plaintiff Creamer upon two conclusions of law, expressed as follows:

> "1. It is manifest as a matter of law that the buyer corporation had become 'purchaser,' in the most literal sense of Section 6323(a), as to the great mass of property and assets constituting the subject matter of the contract between the two corporations, and stood in that position thereunto at the time the tax lien was filed.
>
> "2. The two corporations had a single contract

[3]Shaw v. United States, 9 Cir. 1964, 331 F.2d 493, 496; United States v. Coson, 9 Cir. 1961, 286 F.2d 453, 456-59.

[4]See the annotation in 5 L. Ed. 2d 867-887 on "Construction and application of statute [28 U.S.C. 2410(a)(c)] dealing with actions affecting property on which the United States has a lien."

> of sale and, although the subject matter included a multiplicity of items, there was simply a common and blanket consideration for the whole property, and consequently it would be too rigid in the light of the 'realities' referred to in the Regulation to split the concept of 'purchaser' and say that the buyer corporation, at the time the tax lien was filed, had become a 'purchaser' in very large part, but had not become a 'purchaser' as to the very minor part of the subject matter in the contract of sale."

26 U.S.C. 6323(a) referred to by the district court reads, in pertinent part, as follows:

> "§6323. *Validity against mortgagees, pledgees, purchasers, and judgment creditors*
>
> "(a) *Invalidity of lien without notice.*— . . . the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—"

That statute was recently considered by this Court in *Fore v. United States*, 5 Cir. 1964, 339 F.2d 70. As implicit in that decision, and as held in one of the cases there cited,[5] the purpose of the statute was "to protect mortgagees, purchasers and judgment creditors against a secret lien for assessed taxes and to postpone the effectiveness of the tax lien as against these interests until the tax lien was filed." In the present case, as has been seen, the United States made the jeopardy assessment on March 24, and notice

[5]United States v. Pioneer American Ins. Co., 1963, 374 U.S. 84, 89; see also United States v. Gilbert Associates, 1953, 345 U.S. 361, 363-64.

of the tax lien was filed on March 26. During the two intervening days there was no happening or occurrence which could change Creamer's rights in the slightest. The rights of the parties were the same at the time the lien arose and at the time when notice was filed. In our opinion, therefore, section 6323(a) has no application to the facts of this case.

The sections providing for the creation of the lien are quoted in the margin.[6] The question to be decided is whether at the time of the assessment on March 24, 1959, the taxpayer, Maxwell, owned any property or rights to property in the six lots upon which the tax lien could fasten. The nature and extent of Maxwell's interest in the lots on that date must be determined by state law.[7]

As between Maxwell, the seller, and Creamer, the purchaser, Maxwell's interest may differ from its interest with respect to a creditor without notice, such as the United States. Most pertinent is the Texas re-

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[6]"§6321. *lien for taxes*

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

"§6322. *Period of lien*

"Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time."
26 U.S.C.

[7]United States v. Bess, 1958, 357 U.S. 51, 55; Aquilino v. United States, 1960, 363 U.S. 509, 513; Folsom v. United States, 5 Cir. 1962, 306 F.2d 361, 368.

cording statute, 19 Vernon's Ann. Tex. Civ. St., art. 6627:

> "All bargains, sales and other conveyances whatever, of any land, tenements and hereditaments, whether they may be made for passing any estate of freehold of inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing; and all deeds of trust and mortgages shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they shall be acknowledged or proved and filed with the clerk, to be recorded as required by law; but the same as between the parties and their heirs; and as to all subsequent purchasers, with notice thereof or without valuable consideration, shall be valid and binding."

As to the taxes owed to it, the United States was a "creditor" within the Texas recording statute.[8] A creditor who has obtained a lien by operation of law is protected by the statute.[9] In *Henderson v. Odessa Bldg. & Finance Co.*, just cited (n. 9), a judgment creditor asserted its lien against lot 3 which the debtor had intended to convey prior to the levy, but his deed had mistakenly described lot 5 instead of lot 3. It was

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[8]Underwood v. United States, 5 Cir. 1941, 118 F.2d 760-61; Uhlorn v. Owens, S.D. Tex. 1962, 211 F.Supp. 798, 802, aff'd per curiam "on the reasoning contained in the opinion of the trial court," 5 Cir. 1963, 325 F.2d 92; Hams v. Marshall, 2 Cir. 1930, 43 F.2d 703-04 (opinion by Swan, Circuit Judge, concurred in by Judges Learned Hand and Augustus Hand); Edmundson v. Scofield, S.D. Tex. 1950, 92 F.Supp. 91, 95.

[9]Henderson v. Odessa Bldg. & Finance Co. (Texas Comm'n of Appeals, 1930), 24 S.W.2d 393; United States v. Davidson, 5 Cir. 1943, 139 F.2d 908, 911.

held:

> "The failure to convey the lot levied upon by plaintiffs in error through mutual mistake of the parties gave defendant in error an equitable right to have the deed reformed by correction deed or a decree in equity, but, as plaintiffs in error had no knowledge of such equity at the time their levy was made, the lien thereby fixed was superior to defendant in error's right to such reformation."

24 S.W. 2d at 394.

That decision seems almost "on all fours" with the present case. It follows that the judgment should have gone for the defendants.

The judgment of the district court is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

BROWN, Circuit Judge, dissenting:

This is a startling result. Laws of Texas which are designed to protect innocent persons dealing in faith on the revelations of title records are twisted to permit the great national sovereign to take property from one who is the acknowledged owner of it to apply on the tax debts of another, the former owner who—as the trial Court found and this Court does not dispute—has transferred[10] the property. I do not believe that Congress ever intended any such re-

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[10]See, e.g., "The deed had *inadvertently* failed to include certain real property • • •. The question is whether the federal tax lien attaches to the property *erroneously* omitted from the • • • deed. • • • By *inadvertence* the contract failed to list or describe • • • the six lots of land • • •." (Emphasis supplied)

sult. I do not think that a Court should lend its hand to anything so demeaning to a sovereign.[11]

The Federal Statute creates a lien only "upon all property and rights to property * * * belonging to such person [taxpayer]."[12] Unless there is property belonging to the taxpayer, the Government's lien is nonexistent. The Texas Statute[13] which protects business creditors and those parting with consideration on the faith of apparent record title speaks in terms of the persons against whom the conveyance is not good, such as bona fide purchaser, judgment creditors, etc. Unlike this, the Federal Statute speaks in terms of the origin of the lien. The tax lien arises, the tax lien comes into being, only as to property or rights to property belonging to the taxpayer.

Clearly this property did not belong to Taxpayer. It had no right to such property. True, under Texas law a judgment creditor had a superior claim against the purchaser whose deed was imperfect for late recordation. But the one thing clear is that Taxpayer here had *no* right in or to the property.[14] Not a single Texas case could possibly be dredged up which in even the

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[11]I am at a loss to understand why there is any question about jurisdiction. United States v. Morrison, 5 Cir., 1957, 247 F.2d 285. Under F.R.Civ.P. 54(c) the power of the Court is not affected by the particular section of the code cited in the complaint or the magic words used to describe the relief sought.

[12]26 USCA §6321, note 6 Court's opinion.

[13]Tex.Civ.Stat.Ann. art. 6627.

[14]Texas' Article 6627, set out in the Court's opinion, does speak in terms of conveyances being "void as to all creditors and subsequent purchasers * * * unless * * * recorded * * *." But the concluding portion of the section is positive that "as between the parties * * *" the conveyance "shall be valid and binding."

most remote way would suggest the faintest hope that Maxwell, the vendor-taxpayer, had any rights, legal or equitable, against anyone—Creamer, the public, or the Publican to get the property back or assert any interest in it.

And yet it is this — ownership by the taxpayer — which gives rise to the lien for the National Government. Congress has not said that this Nation has a tax lien against any and all property once owned by a delinquent taxpayer to the same extent as some innocent purchaser or judgment creditor might have under local recordation statutes.

Once Congress so declares, Courts must enforce it. But the morality of the Government's taking property which the Court's opinion reflects was sold to, paid for by, and in equitable conscience and law belonged to a stranger, is so disturbing to me that before the heavy hand of the tax gatherer falls, it is for Congress to speak clearly to declare that this is the conscience of the country.

I therefore respectfully dissent.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1964

No. 21188

D. C. Docket No. C. A. No. 4673—Civil

UNITED STATES OF AMERICA and ELLIS CAMPBELL, JR., Appellants,

versus

CREAMER INDUSTRIES, INC., Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before RIVES, BROWN and WISDOM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court in accordance with the opinion of this Court. Brown, Circuit Judge, dissents.

July 2, 1965

Issued as Mandate: July 26, 1965

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 624

CREAMER INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND ELLIS CAMPBELL, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The district court's findings of fact and conclusions of law (R. 151–157) are not officially reported. The opinion of the court of appeals (Pet. 27–33) is reported at 349 F. 2d 625.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1965 (Pet. 36). The petition for a writ of certiorari was filed on September 28, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal tax lien attaches to real property erroneously omitted from a deed executed by a taxpayer when, as a matter of State law, the failure to record the conveyance of such property renders its transfer void as against creditors of the taxpayer.

STATUTES INVOLVED

Section 6323 of the Internal Revenue Code of 1954, 26 U.S.C. 6323, provides in pertinent part:

> SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.
>
> (a) Invalidity of Lien Without Notice.—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

19 Vernon's Texas Civil Statutes Annotated provides:

> Art. 6627. *When sales, etc., to be void unless registered*
>
> All bargains, sales and other conveyances whatever, of any land, tenements and hereditaments, whether they may be made for passing any estate of freehold of inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing; and all deeds of trust and mortgages shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they shall be acknowl-

edged or proved and filed with the clerk, to be recorded as required by law; but the same as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof or without valuable consideration, shall be valid and binding.

STATEMENT

On January 21, 1959, petitioner and Maxwell Steel Company, Inc., ("Maxwell") entered into a contract whereby all of Maxwell's assets were to be conveyed to petitioner (Pet. 27–28). Both the contract and the deeds, executed on the same date, inadvertently omitted six lots of land, five of which are the subject of this lawsuit (Pet. 28).

On March 24, 1959, the United States made a jeopardy assessment against Maxwell. Notice of the tax lien which arose by virtue of the assessment was filed on March 26, 1959. On or about April 1, 1959, Maxwell executed and delivered a correcting deed, conveying the parcels in issue to petitioner (Pet. 28), and the deed was recorded on April 28, 1959.

In an action to quiet title, brought under 28 U.S.C. 2410, the district court held that petitioner's right was superior to the tax lien. The court of appeals reversed on the ground that under Texas law Maxwell's purported transfer of the property was void as against its creditors, and that the United States was in the position of a creditor (Pet. 27–33).

ARGUMENT

1. The court of appeals applied well-settled principles in looking to State law to determine whether

the property in question belonged to the taxpayer against whom the tax assessment had been made (*i.e.*, Maxwell) on the date on which the government's lien was filed. By virtue of a Texas statute, any conveyance of real property in that State which is unrerorded is "void as to all creditors" (p. 2, *supra*). The Texas courts have held that although a deed which inadvertently omits property which the parties intended to transfer may be corrected at the instance of the buyer, it conveys no greater rights against creditors or subsequent purchasers than an unrecorded instrument. *Henderson* v. *Odessa Building & Finance Co.*, 24 S.W. 2d 393 (Tex. Comm'n App.).[1] See also *United States* v. *Davidson*, 139 F. 2d 908 (C.A. 5). Hence it follows that, after its agreement with petitioner, Maxwell retained, under Texas law, enough of an interest in the omitted parcels of land to be able to transfer superior title to a bona fide purchaser or to have the property subjected to seizure by its creditors.

The Texas statute renders the conveyance void as to creditors holding liens by operation of law, and this category includes federal tax liens. *Parker Square*

[1] In *Henderson*, a judgment creditor asserted its lien against property which the debtor had intended, but neglected, to convey by a deed prior in time. The Texas court said (p. 394):

> The failure to convey the lot levied upon by plaintiff in error through mutual mistake of the parties gave defendant in error an equitable right to have the deed reformed by correction deed or a decree in equity, but, as plaintiffs in error had no knowledge of such equity at the time their levy was made, the lien thereby fixed was superior to the defendant in error's right to such reformation.

State Bank v. *Triangle Supply Co.*, 364 S.W. 2d 418 (Tex. Civ. App.); *Underwood* v. *United States*, 118 F. 2d 760 (C.A. 5); *Uhlhorn* v. *Owens*, 211 F. Supp. 798 (S.D. Tex.), affirmed *sub nom. Security State Bank* v. *Uhlhorn*, 325 F. 2d 92 (C.A. 5). The holding in the present case merely puts the government's tax lien on a par with any other lien created by operation of law, which must depend upon record title for its satisfaction. In order to carry out its recordation policy[2] the State has, in effect, refused to recognize as against third parties any unrecorded transfer of real property. The interest retained by the vendor under these circumstances qualifies under Section 6321 as "property" to which a tax lien may attach.

2. There is no merit to petitioner's claim that the tax lien is invalid under Section 6323(a). That provision (p. 2, *supra*) relates to interests obtained between the time at which a lien is imposed and the date on which a notice of lien is filed. In the present case, as the court of appeals observed, "[d]uring the two intervening days there was no happening or occurrence which could change [petitioner's] rights in the slightest. The rights of the parties were the same at the time the lien arose and at the time when notice was filed" (Pet. 31). Since, as we have shown, the transfer was void as against creditors under Texas law before the deed was corrected and recorded, it was void for the full period relevant under Section 6323(a).

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[2] See *Peninsula State Bank* v. *Thompson-Copeland, Inc.*, 346 F. 2d 58 (C.A. 5).

3. Nor, in the light of *United States* v. *Pioneer American Ins. Co.*, 374 U.S. 84, is there any conflict which requires this Court's resolution between the decision here and that in *Gauvey* v. *United States*, 291 F. 2d 42 (C.A. 8). The issue believed by the Eighth Circuit to be dispositive in *Gauvey* was whether a conditional sales contract was a "mortgage" within the meaning of Section 6323; the court assumed that if it was a mortgage it was superior to a federal tax lien which arose subsequently but which was filed before the contract was recorded. 291 F. 2d at 47. This Court held in the *Pioneer American Insurance Co.* case that Section 6323 "did not purport * * * to subordinate the tax lien to tentative, conditional or imperfect state liens." 374 U.S. at 89. It seems quite clear, therefore, that the premise of the *Gauvey* decision—that unperfected liens or interests of the sort encompassed by Section 6323 are superior to later federal tax liens which are filed first—is erroneous.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney.

OCTOBER 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965